

A **ATHMALINGAM MUNIANDY & ANOR**

v.

KHU LI HUANG

B HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING JC
[CIVIL APPEAL NO: 12-52-2005]
18 MARCH 2010

C **ROAD TRAFFIC:** *Negligence - Collision between motor cycle and lorry - Liability - Lorry driver denying he collided into motorcyclist but damage to motorcycle showing otherwise - Whether apportionment of 90:10 liability by trial judge proper*

D **DAMAGES:** *Appeal - Appeal against quantum - Road accident - Multiplier - Expected life span of quadriplegic - Costs of nursing care, disposable napkins and special food*

E **TORT:** *Damages - Road accident - Assessment - Multiplier - Expected life span of quadriplegic - Costs of nursing care, disposable napkins and special food*

F **DAMAGES:** *Appeal - Objections raised on appeal - Capacity of claimant to file action and procedural irregularities - Objections not raised in trial court - Whether failure to do so amounted to waiver - Whether issues of a technical nature - Whether injustice caused to defence*

G In this appeal, the plaintiff (the respondent on appeal) became a quadriplegic as a result of a road accident between the motorcycle she was riding pillion on and a lorry driven by the 1st defendant and owned by the 2nd defendant (the appellants on appeal). The rider of the motorcycle was killed in the accident. The motorcycle was collided into by the lorry whilst it was stationary behind a motorcar driven by another who was waiting to turn right into a particular road. The plaintiff filed a claim against the defendants via her father as she was an infant and a person under disability at the material time. However, when she attained the age of majority, she applied to amend the statement of claim to sue in her personal capacity which was allowed by the court with no objection from the defence. The sessions judge apportioned liability at 90:10 between the defendants and the deceased motorcycle rider. The parties were dissatisfied with the sessions

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court decision and appealed. The defendants appealed against the entire decision whilst the plaintiff cross-appealed against some awards of special damages. The defendants then raised the following objections on appeal: (1) that the plaintiff's application for amendment to sue in her personal capacity should not have been allowed as it was trite law that any amendment dated back to the date of the filing of the suit with the result that she had filed the suit when she had no capacity to do so; (2) that the witnesses were not referred to by name when they were recalled; and (3) that the 1st defendant was called before the plaintiff had closed her case.

Held (allowing appeal in part):

- (1) The application for amendment was allowed when there was no objection from the defence in the trial court. That point was raised as an afterthought on appeal. The failure to object amounted to a waiver (*Ex parte Brocklebank; In re Brocklebank; Shamugam S Kanapathy v. Pappah Chinniah Nadar*; refd). Had the defence objected, the plaintiff could have followed the proper procedure under the Subordinate Courts Rules to adopt the proceedings when she attained the age of majority. Further, the objection should not be allowed as any action the plaintiff had against the defendants would have been barred by limitation. The failure to comply with the rules in the circumstances was a mere irregularity which did not prejudice the defence in any way. (para 3)
- (2) It was good practice to record the names of the witnesses even when recalled rather than referring to them as SP2 or SD1. However, the failure to do so in the present case did not give rise to any ambiguity and it was perfectly clear who the witnesses were. Similarly, although it was not recorded that some of the witnesses were re-affirmed when they were recalled, they were all reaffirmed at the outset when they had given evidence and no objection was ever taken that the witnesses were giving unsworn evidence. (para 4)
- (3) When the court allowed the plaintiff's application to have the 1st defendant's evidence recorded before the close of the plaintiff's case, the defence had raised no objection. Further, that procedure was adopted in all probability to save judicial

- A time and to avoid inconveniencing the witnesses, not to mention reducing costs. The procedure, although irregular and ill-advised with the probability that it might open the door to objections that the court had to deal with, nevertheless caused no injustice to the defence. Had it been otherwise, the defence should have raised its objections at that material time and not only on appeal. (para 5)
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- (4) Although counsel raising the objections was not the counsel on record at the trial stage, it was unjust that the defence should be allowed to resile on matters agreed to at an earlier stage of the trial. Further, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceedings unless a substantial miscarriage of justice occurred. (para 6)
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- D (5) The defence gave contradictory versions as to how the collision occurred. Also, the trial judge found the 1st defendant, an untrustworthy witness as compared with the plaintiff who had been consistent throughout her evidence. That apart, the minimal damage to the motorcar and the extensive damage to the motorcycle were inconsistent with the motorcycle having only collided into the car. It followed that there was no reason to disturb the apportionment of liability by the trial judge. (para 9)
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- F (6) It was uncertain as to what evidence the trial judge relied upon to come to a finding that the plaintiff's expected life span was 72 years. There was the evidence of the orthopaedic specialist that normal expectancy was 70 years and her life span might be reduced by 10 years because of her quadriplegia. The trial judge erred in not deducting one-third from the expected life span. Based on a 70-year life span and a deduction of 10 years due to quadriplegia, the plaintiff would have an expectation of life of 60 years. The expected life span then would be $60 - 16 = 44$. After deducting one-third for contingencies, the round figure would be 30 years. (para 10)
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- (7) The costs of disposable napkins were calculated at $3 \times 6 \times 365 \times 30 = \text{RM}197,100$ and that award was substituted with that of the sessions court. (para 10)
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- (8) It would cost the plaintiff RM800 per month inclusive of food if the plaintiff were to stay in a nursing home. The plaintiff was not admitted into such a home, but that figure could be used as a guide. The trial judge should have deducted RM150 for food instead of awarding the full RM800. That would leave a sum of RM650. There was no reason why the plaintiff's mother should be burdened with the care of her daughter and paid a lesser sum than she would have otherwise paid a carer. With the 30-year multiplier, a reasonable sum for nursing care was $RM650 \times 12 \times 30 = RM234,000$. (para 10)
- (9) The trial judge was not wrong in awarding RM20 per day for special food based on the evidence of the nutritionist. The nutritionist's evidence that the plaintiff needed special food was not challenged. As such, the award under that head was $RM20 \times 365 \times 30 = RM219,000$. (para 10)
- (10) As to the pre-trial portion of the damages, interest at 4% per annum was ordered from the date of accident until the date of judgment. (para 11)

[Each party to bear own costs.]

Case(s) referred to:

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1994] 1 CLJ 19 HC

Ex parte Brocklebank. In re Brocklebank [1877] Ch D 358

Krishnan Marimuthu & Anor v. PP [1982] CLJ 186; [1982] CLJ (Rep) 152 FC

Mokhtar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA

Shamugam S Kanapathy v. Pappah Chinniah Nadar [1994] 2 CLJ 265 HC

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 2 r. 3

For the appellant - M/s Jagjit Singh & Co

For the respondent - M/s Manjit & Co

Reported by Usha Thiagarajah

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JUDGMENT**Ho Mooi Ching JC:**

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[1] On 28 April 1999 along the Bandar Baru/Serdang road, the plaintiff Khu Li Huang (SP3) was riding pillion on motorcycle ACC 9994 ridden by one Ang Lay Hoon, when they were involved in an accident which rendered her a quadriplegic and killed the rider. The Sessions Court accepted the evidence of SP3 that the motorcycle had been collided into by an oncoming lorry PAF 3436 driven by the 1st defendant ('SD1') and owned by the 2nd defendant ('D2') Liability was apportioned at 90:10 between the defendants and the deceased motorcycle rider and judgment was entered for the plaintiff but it pleased neither the plaintiff nor the defendants. The defendants appealed against the entire decision while the plaintiff cross-appealed against some awards of special damages. After hearing the parties, I decided not to disturb the trial court's finding on liability and allowed the appeal on certain items of quantum. The defendants remain dissatisfied and now appeal against the whole of my decision.

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Capacity

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[2] SP3 had sued by her father as her next friend as she was an infant and a person under disability at the time the claim was filed. After she attained the age of majority, by an order of amendment dated 27 July 2002, the summons was amended so that the plaintiff acted in her personal capacity. She should properly have adopted the proceedings. The defence submitted that it is trite law that any amendment dates back to the date of filing the suit, with the result that she had filed the suit when she had no capacity to do so.

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[3] The application for amendment was allowed when the defence did not object to it. This point was not even raised in submission in the trial court and was raised as an afterthought on appeal. I accept the submission of learned counsel for the plaintiff that the failure to object amounted to a waiver (see *Ex parte Brocklebank*. *In re Brocklebank* [1877] Ch D 358). In *Shamugam S Kanapathy v. Pappah Chinniah Nadar* [1994] 2 CLJ 265, Edgar Joseph Jr SCJ held that the failure of the plaintiff to comply with the requirements of any rules in beginning proceedings must be deemed to have been waived and treated as a mere irregularity

not nullifying the proceedings where the defendant had failed to take any objection to the form of commencement and had entered an unconditional appearance. In this case, the form of commencement was proper as the plaintiff had acted by her next friend. When she testified on 8 April 2002, she was already an adult and on 27 July 2002, her application to amend the statement of claim to state that she was acting in her personal capacity was granted without objection from the defence. Had the defence objected, then the plaintiff could have followed the proper procedure under the Subordinate Courts Rules to adopt the proceedings once she came of age. Following the case of *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 1 CLJ 19, I am of the view that it is clearly not fair to entertain the objection now at this late stage as any action the plaintiff has against the defendants would have been barred by limitation. I considered the failure to comply with the rules in these circumstances a mere irregularity which did not prejudice the defence in any way.

Procedure

[4] Mr. Jagjit Singh for the appellants raised a litany of complaints about procedural matters in the trial court. One complaint is that some of the witnesses were not referred to by name when they were recalled. Although it is good practice to record the names of the witnesses even when they are recalled rather than referring to them, for example, as 'SP2' or 'SD1', in this case, the failure to do so did not give rise to any ambiguity and it is perfectly clear who the witnesses were. Similarly, although it was not recorded that some of the witnesses were re-affirmed when they were recalled, they were all affirmed at the outset when they gave evidence and no objection was ever taken that the witnesses were giving unsworn evidence.

[5] I noted the further complaint of the defence that the defendant SD1 was called before the plaintiff had closed her case. On 11 August 2002, learned counsel for the plaintiff asked that the defence proceed with its case first as he still wished to call the investigating officer who was absent that day. It was noted 'P6: Tiada bantahan' ('P6' should probably read 'P.D' as the abbreviation for 'peguam defendan') and the court allowed the application to have SD1's evidence recorded before the close of

A the plaintiff's case. No objection was ever raised by the defence and this procedure was adopted in all probability to save judicial time and to avoid inconveniencing the witnesses, not to mention reducing costs. I agree that the procedure is irregular and probably ill-advised as it may open the door to objections that this court
B has now to deal with. Nevertheless, what is of paramount importance is that it caused no injustice to the defence. Had it been otherwise, learned defence counsel should have raised his objections at the time and not only on appeal.

C [6] It is unfortunate that all these objections which should have been raised in the trial court were only raised at the appeal stage after the defence indicated that it had no objections to some of the applications. Although Mr. Jagjit Singh who is arguing the appeal was not the counsel on record at that stage of the trial, it
D is unjust that the defence should resile on matters agreed to at an earlier stage of the trial. Further, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding unless it occasions a substantial miscarriage of justice (see *Mokhtar Amin v. Mohamed Mokhtar Omar*
E [2001] 4 CLJ 489 decided before the introduction of the RHC O. 1A, O. 2 r. 3, of which there is no equivalent provision in the Subordinate Courts Rules). The matters raised are of a technical nature and did not cause a substantial miscarriage of justice to the defendants. Indeed, they caused no injustice at all to the defence
F and the court which had been indulgent in allowing the plaintiff to present her case piecemeal had been equally indulgent in allowing time for the defence to call its expert witness despite the delay.

G **Liability**

[7] The Sessions Court accepted SP3's testimony that the defendants' lorry had encroached into the motorcycle's side of the road and collided into it while it was stationary at a distance of about 5 feet behind motorcar PBG 979 driven by Ibrahim bin
H Ishak (SP6), who was waiting to turn right into the road to Kampung Bagan Samak. The learned trial judge accepted her evidence that although the handle of the motorcycle was slanting to its right, it was on its own side of the road when the lorry collided into it. After pointing out various discrepancies in SD1's
I evidence, the learned trial judge found him an untruthful witness

and rejected his evidence. She also embarked on impeachment proceedings in respect of him and I agree that having done so, she erred in not stating her finding but it is apparent from her judgment that SD1's credit was not impeached. Had it been otherwise, she would not have gone on to consider his evidence and then find him unworthy of credit. In *Krishnan Marimuthu & Anor v. PP* [1982] CLJ 186; [1982] CLJ (Rep) 152, the learned trial judge did not make a specific finding that the cautioned statement of the second appellant used by the prosecution to impeach his credit was voluntarily made, though in the inquiry held for the purpose the prosecution had adduced enough evidence to enable the learned trial judge to make such a finding. The Federal Court held that such omission in the circumstances of the case did not constitute a miscarriage of justice and dismissed the appeal. By analogy, the fact that the trial judge took into consideration the evidence of the defendant in coming to a finding on liability shows that she had not impeached SD1's credit.

[8] The defence called an expert witness (SD3) in accident reconstruction to theorise as to how the accident took place. He was only asked to reconstruct the accident about four years after the event and admitted that although it was important to interview all the witnesses, he only interviewed PW6 and relied on the notes of evidence for the rest of the material witnesses. His evidence was that there was a glancing collision between the defendants' lorry and the motorcycle which caused the motorcycle to come into contact with the car in front of it ie, the car driven by PW6. He concluded that the tyre marks in the lane CD came from the lorry and shows that it was on its own side of the road. Under cross-examination, he admitted that the tyre marks do not appear in the sketch plan prepared by the investigating officer (SP2). It must also be noted that SP2 had never been cross-examined on the tyre marks either when he was first called or when he was recalled. Even though tyre marks are apparent from the photographs, had it been the defence case that they were caused by the lorry, it should have been put to SP2 so that he may have had a chance to explain whether they came from the lorry. Instead, SD3 merely relied on the photographs and said that just by looking at the photographs he could confirm that the two tyre marks came from the same vehicle. He explained that it was not possible for the lorry to collide into the motorcycle as it

- A would have had to hit the motorcar first before hitting the motorcycle. However, under cross-examination he concluded that the damage to the motorcycle was from the collision of the lorry into it and by the damage it was a powerful impact. This was somewhat inconsistent with his earlier version that it was a
- B glancing blow by the lorry to the handle of the motorcycle. Further, his report was based on the premise that the motorcycle was parallel to the centre line whereas the evidence is clearly that the handle of the motorcycle was slanted to its right.
- C [9] The learned trial judge made no direct reference to SD3's evidence. However, she discounted the defendant's evidence that the only contact was between the motorcycle and PW6's car. I agree that had it been so, the damage to PW6's car could not have been scratches to the bumper when the damage to the
- D motorcycle was extensive according to the photographs tendered. The version put forward by SD3 also directly contradicted SD1's evidence that there was no contact between his lorry and the
- E learned trial judge had found SD1 an untrustworthy witness as compared with SP3 who had been consistent throughout her evidence. This is the audio-visual advantage which the trial court has over an appellate court. Although the trial court found encroachment by the lorry, it is clear from the physical evidence
- F that the collision occurred in the centre of the road. Distances given in testimony in such cases cannot be measured with mathematical precision nor are there geographical divisions on the road. It cannot be discounted that the motorcycle was nearer the
- G centre of the road than stated by SP3 and since the handle of the motorcycle was slanted to its right, the lorry could well have collided into it as conceded by SD3, causing the extensive damage to its front as described by SP2 and as shown in the photographs. SP6 was adamant that the motorcycle did not
- H collide into his car but he did feel his car move after the lorry had passed it and he heard the sound of a collision. The presence of scratches on the rear bumper of his car is consistent with SD3's theory that the motorcycle made contact with his car after it fell as a result of the collision with the lorry. The minimal damage to SP6's car and the extensive damage to the motorcycle were
- I inconsistent with the motorcycle having collided into the car only. Even assuming that there had been no encroachment by the lorry,

I found no reason to disturb the apportionment of liability by the learned trial judge as the lorry had collided into a motorcycle stationary at the centre of the road when there was sufficient space for the lorry to pass safely.

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Quantum

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[10] The main bone of contention was the multiplier. The trial court found that the plaintiff had an expected life span of 72 years. It is uncertain what evidence she relied on to come to this finding. There is the evidence of the orthopaedic specialist SP8 that normal life expectancy is 70 years and her life span may be reduced by 10 years because of her quadriplegia if she has proper nursing care and she probably has another 40 years to live. Both sides agree that the trial court erred in not deducting one-third from the expected life span. Taking 70 years as the life span and deducting 10 years as a result of her quadriplegia, she would have expectation of life of 60 years. The expected life span would be $60 - 16 = 44$. After deducting one-third for contingencies, the result would be 30 (rounded up).

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Cost of disposable napkins: $3 \times 6 \times 365 \times 30 = \text{RM}197,100$ and I would substitute the Sessions Court's award with the award as stated.

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Cost of Nursing Care: Evidence given by SP7 was that it would cost the plaintiff RM800 per month inclusive of food to stay in her nursing home. Although the plaintiff was not admitted into the home, the figure can be used as a guide. Instead of awarding the full RM800, the learned trial judge should have deducted a sum for food. Deducting RM150 per month for food, we would be left with RM650 per month. There is no reason why the plaintiff's mother should be burdened with the care of her daughter and paid a lesser sum than she would otherwise have to pay a carer. Applying the multiplier of 30 years, I found that a reasonable sum for nursing care is $\text{RM}650 \times 12 \times 30 = \text{RM}234,000$.

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As for the cost of special food, I find that the learned trial judge was not wrong in awarding RM20 per day based on the evidence of SP1, the nutritionist. Her evidence that the plaintiff needed special food was not challenged. The award under this head using the multiplier adopted was $\text{RM}20 \times 365 \times 30 = \text{RM}219,000$.

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A [11] The appeal was allowed by substituting for the awards of the Sessions Court the awards for nursing care, cost of disposable napkins and the cost of special food as indicated above. With regard to the pre-trial portion of the damages, interest at 4% pa was ordered from the date of accident until the date of judgment.

B The other awards of the trial court were undisturbed. As each party was partly successful in his/her appeal, I ordered each party to bear his/her own costs.

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